CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3877

Heard in Calgary, Tuesday, 9 March 2010

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Assessment of twenty (20) demerits to Conductor P. Mousir of Calgary for non-compliance to GOI section 8.12.7: not using proper body mechanics to line a high switch standard.

COMPANY'S STATEMENT OF ISSUE:

On May 22, 2009, the grievor was assigned as the helper on yard assignment YBXS30-22. During this assignment the grievor was observed lining switches on two occasions with the use of one hand.

Through the investigation process, the Company determined that the grievor was in violation of General Operating Instruction section 8.12.7 and assessed twenty (20) demerits.

The Union contends that the grievor was observed with the use of a camera and the discipline assessed as a result of such improperly obtained evidence is void ab initio.

The Company disagrees with the Union's contentions.

FOR THE COMPANY:

(SGD.) P. PAYNE
FOR: DIRECTOR, HUMAN RESOURCES

There appeared on behalf of the Company:

P. Payne	– Manager, Labour Relations, Edmonton
K. Morris	– Sr. Manager, Labour Relations, Edmonton
D. Crossan	– Manager, Labour Relations, Prince George
C. Mitchell	– Trainmaster, Calgary
C. Tytgat	– Trainmaster, Calgary

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
B. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton
G. Mensaghi	– Local Chairman, Calgary
H. Richardson	– Former Local Chairman, Calgary

P. Mousir – Grievor

AWARD OF THE ARBITRATOR

It is not disputed that the grievor was observed handling two high-mast switches, lining both of them with the use of only one hand. It is not disputed that his actions were contrary to the Company's Safety Rules GOI Section 8.12.7. It also does not appear disputed that Mr. Mousir had previously suffered eleven work-related injuries, two of which were caused by improperly lining switches. He should have used two hands in handling the switches as reflected in the requirements of GOI Section 8, paragraph 12.7 which reads, in part, as follows:

> PURPOSE: To identify basic principles of body mechanics using muscles and body weight more efficiently while operating hand switches, in order to minimize the risk of injury.
>
> …
>
> HIGH SWITCH STAND
> Grasp the lever with two hands and secure footing, lean backwards allowing your body weight to assist in pulling the handle across the top plate in a smooth motion.

It also does not appear disputed that upon his return to work from a previous absence Mr. Mousir had been refreshed on the contents of GOI Section 8 by his supervisor, a matter of days before the incident here under review.

The real thrust of the Union's case is that the discipline should be declared void *ab initio* because the grievor was observed violating the GOI Section 8 provisions by Trainmaster Chris Mitchell through the video camera system available in his office by which he is able to observe the yard. It is not disputed that that is how Trainmaster Mitchell did observe the grievor's infractions. The Union stresses the Company's long-standing undertaking that the system of observation cameras installed in the yard at Calgary is not to be used to watch employees for the purposes of assessing discipline. The Union asserts that for a supervisor to have observed the grievor by means of a camera system for the purpose of evaluating his work and possibly assessing discipline

is contrary to Section 5(3) of the **Personal Information Protection and Electronic Documents Act**, S.C. 2000, c. 5. Counsel for the Union also refers the Arbitrator to extensive arbitral jurisprudence surrounding the right of employees to be free of any undue incursion into their privacy, including awards relating to video surveillance. The cases are largely cited and reviewed in **Re Fraser Surrey Docks Ltd. and International Longshore and Warehouse Union, Loc. 514**, (2007), 159 L.A.C. (4th) 72 (Taylor).

A threshold question in the case at hand, one of considerable importance, is whether the use made of the surveillance system by Trainmaster Mitchell was, in the circumstances, improper, in the sense that it was uniquely for the purpose of observing the grievor with a view to evaluating his performance and possibly imposing discipline. It does not appear disputed by either party that such a use of the surveillance camera system, a system essentially installed for the purposes of ensuring security in the yard and monitoring the movement of trains and blocks of cars, would render the evidence inadmissible. When close regard is had to the evidence, the Arbitrator has some difficulty with the Union's suggestion that the trainmaster did violate the grievor's privacy rights as suggested.

As a matter of first principle, 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. That issue was touched upon in the award of Arbitrator Taylor in **Re Fraser Surrey Docks** at paragraphs 169 – 171:

> The issue before me concerns video surveillance; however, it is not whether the Employer is entitled to install video surveillance. The Employer already has a comprehensive system of video surveillance, involving some 45 cameras patrolling the entire site 24 hours a day, and there is no dispute that this system is justified by the Employer's security concerns and regulatory regime. Employees are aware the site is under 24-hour video surveillance.
>
> Accordingly, the issue before me is not whether the Employer is entitled to place this worksite under video surveillance generally. **The issue is whether the Employer was justified in using its video surveillance system in the manner it did**, with respect to the two instances of recorded video in question: the March 25 video in which Mr. Buckle caused a camera to follow the Grievor's truck after

> he saw it entering the site with garbage bags in the back, and the April 1 video, taken by a movable camera that was fixed on the gas pumps due to concerns about the theft of gas.
>
> Where video surveillance is justified, it may record different types of misconduct than the risk that justified the video surveillance in the first place: see e.g. PIPEDA Case Summary No. 264 (February 19, 2004); X. v. Y. (Z Grievance), supra. **An employer is not required to overlook video evidence of employee misconduct merely because it is captured on a security video.**
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> (emphasis added)

The evidence before the Arbitrator in the case at hand discloses that on the day in question, May 22, 2009, the grievor was working on the Calgary Yard assignment YBSX30-22. Part of that assignment was going to involve Trainmaster Mitchell following the grievor and his crew to the CP interchange tracks where he was going to assist them in pulling cars from four tracks. In other words, Trainmaster Mitchell had an interest in knowing when the grievor and his crew had finished preparing their train and had departed from the yard towards the CP interchange tracks. I am satisfied that for that purpose he used the camera system with the intention of observing whether the grievor's train had yet departed. It is in the course of that observation that he saw Conductor Mousir handling the switches in an incorrect fashion. Based on what he saw he proceeded immediately to the location where Mr. Mousir was working to advise him that he had handled the switches in an unsafe manner and that he should correct his practice. It was subsequently determined that an investigation should take place, following which discipline was assessed against the grievor.

In the Arbitrator's view the facts reviewed above fall well within the principle enunciated by Arbitrator Taylor. The incidental observation of an unsafe practice is not inadmissible at arbitration merely because it was observed on a video screen which was in fact being used for another purpose. While the argument made by the Union would be compelling if it could be established that the trainmaster's sole purpose in observing the location of the grievor's work was to evaluate him for the purposes of possible discipline, that is clearly not what transpired in fact.

For the foregoing reasons I am satisfied that the Company did not violate the grievor's privacy rights and that the evidence with respect to his unsafe handling of the switches is admissible. His conduct did make him liable to discipline, particularly has he had previously been disciplined for exercising undue care in the application of a hand brake, which was resulted in a personal injury to himself, as well as the fact that he had previously injured himself in the handling of switches and had recently been refreshed on the importance of the very rule which he was observed to be breaking. In light of the grievor's relatively heavy disciplinary record, which does involve rules violations and includes a discharge which was commuted to a lengthy suspension, I am satisfied that the assessment of twenty demerits was appropriate and should not be disturbed. The grievance must therefore be dismissed.

March 15, 2010

(signed) MICHEL G. PICHER
ARBITRATOR