CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4292

Heard in Calgary, March 11, 2014

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADIAN RAIL CONFERENCE

DISPUTE:

Violation of Article 152 of Agreement 4.3 and the *Personal Information Protection and Electronic Documents Act (PIPEDA)* following the installation of a camera in the booking in room in Prince George, BC.

COMPANY'S EXPARTE STATEMENT OF ISSUE:

On March 7, 2013, the Company installed a camera in the Prince George yard office booking-in room following the anonymous posting of offensive material on the bulletin board. The posting of such material was reported to CN management by a unionized employee. On March 17, 2013, the camera was removed from the workplace. The camera did not have audio capability and no video recordings were made from it.

On March 26, 2013, the Company received a grievance from the Union concerning use of the camera. On April 23, 2013, the Company declined the grievance on the basis that the installation of this camera for the above-noted purpose did not breach the collective agreement or applicable legislation.

In addition to the above, the Company submits that the issue raised in the grievance is moot and objects to the Union's attempt to expand the scope of the dispute to include grievances submitted by Division 105 – representing Conductors and Engineers on the former BCR, which are distinct grievances filed by other bargaining units.

UNION'S EXPARTE STATEMENT OF ISSUE:

On March 13, 2013 a CN running trades crew discovered that the Company had installed a hidden camera in a the book in room at Prince George which was designed to conduct surreptitious surveillance of the employees in this room. The Company had given no notice that it would or needed to collect surreptitious surveillance evidence for any reason. There had been no suggestion by the Company that any incidents had occurred prior to the installation of this camera in the booking room.

The above noted camera had recording capability. The Union is not aware as to how long the camera had been installed in the booking room. On or about March 18, 2013 a grievance was filed at the local level by the local chairpersons on behalf of Division 105 (CTY

and EN). On March 26, 2013, the General Chairman advanced an appeal to the Company's Vice President in accordance with Article 121.1 (c) of Agreement 4.3.

It is the Union's position that the Company violated all of the above provisions and protections for employees working under Agreement 4.3 This includes an employee's reasonable expectation of privacy.

On April 23, 2013, the Company advised that in its view video surveillance was permitted by law under certain circumstances. The Company's reply to the grievance implicitly denied the grievance.

The Union does not accept the Company's response. The Union thereafter provided the Company with notice that it desired to proceed to arbitration with this grievance.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. Hackl	**(SGD.) D. Crossan on behalf of K. Madigan**
General Chairman	**VP Human Resources**

There appeared on behalf of the Company:

D. Crossan	– Manager Labour Relations,
K. Morris	– Senior Manager Labour Relations, Edmonton
J. Girard	– Counsel, Montreal
P. Payne	– Manager Labour Relations, Edmonton
D. Gagne	_ Senior Manager, Labour Relations, Montreal

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray Toronto
R. Hackl	– General Chairman, Saskatoon
B. Willows	– General Chairman, Edmonton
J. Holiday	– General Chairman, Prince George
J. Lennie	– Vice General Chairman, Port Robinson
R. Ermet	– Senior Vice General Chairman, Edmonton
D. Finnson	– National Vice President, Calgary
G. Buckley	– Local Chairman, Squamish
G. Mensaghi	– Local Chairman, Calgary

AWARD OF THE ARBITRATOR

This case concerns whether the Canadian National Railway Company ("the Company") violated the collective agreement between the parties, and the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"). The context of the allegation stems from surreptitious surveillance undertaken by the Company over a period of nine days in March 2013.

There is no dispute that the Company is subject to *PIPEDA* and that I have the jurisdiction to interpret apply and make findings regarding violations of the statute.

The facts are not in dispute. On January 29, 2013, at approximately 0100 hours an employee ("ER"), who has since resigned from the Company, entered the booking-in room located in the Prince George south yard office. The booking-in room is an unrestricted area accessible to all Company employees, contractors and/delivery personnel. ER, who is gay, noticed that someone had posted on the bulletin board a note to which a whistle was attached. The note read: "Rape Whistle." ER removed the note with the attached whistle and went to see his supervisor, Ms. Shelli Boomhower ("Supervisor Boomhower") upon her arrival at work.

ER expressed to Supervisor Boomhower that he was extremely upset. ER conveyed to her that the previous summer he had been raped and beaten in downtown Prince George. He felt that the posting was targeting him. ER expressed that he felt intimidated and threatened and reported the incident as harassment in the workplace. ER wanted his complaint to be treated confidentially for fear that he would be subject to additional harassment. Supervisor Boomhower conveyed that she would raise the issue with Superintendent Hart.

Supervisor Boomhower relayed ER's concerns to Superintendent Hart, who instructed her to contact the CN Police to request their assistance to investigate. She did so, and met with CN Police Constable Thorne ("Constable Thorne"). Supervisor

Boomhower explained the circumstances to Constable Thorne and asked if there was anything the CN police could do about the situation.

Approximately 40 minutes later, Constable Thorne met with Superintendent Hart. Superintendent Hart expressed that he wanted to put a surveillance camera in the booking-in room to see if additional “harassing items” were posted. Constable Thorne conferred with Inspector Ritchie who advised that the CN police could not put up a surveillance camera. Inspector Ritchie asked Constable Thorne to provide Superintendent Hart with the name of the Company that could undertake surveillance.

Constable Thorne followed up with ER who was unable to provide any additional information, other than the whistle had been on a shelf outside TMC Watson’s office in the booking-in room for approximately 2-3 weeks. On January 31, 2013, Constable Thorne followed-up with TMC Watson and she reported that she first noticed the whistle and note on the bulletin board the evening of Sunday, January 27, 2013.

On January 31, 2013 Superintendent Hart purchased a camera for surveillance with no audio capability to be installed by a security company. The camera was installed on March 7, 2013, to monitor the bulletin board. Between January 31, 2013 and the date of installation, no new postings or misconduct were reported the booking-in room.

The camera operated by transmitting the images captured on the camera to a receiver in Superintendent Hart's office. Due to a technical error, none of the images were recorded.

On March 13, 2013 a running trades crew discovered the camera surreptitiously mounted in the clock. Ultimately Superintendent Hart retrieved the camera, attempted to review the video footage and realized there was none due to the aforementioned technical problem. The camera was not reinstalled.

Decision

The Union alleges that the installation of the camera constituted an unreasonable privacy violation under Agreement 4.3 and section 5(3) of *PIPEDA.* In March 2013, when the Union filed the grievance in response to the camera's discovery, the Union requested that the Company cease the surreptitious electronic surveillance (which had already been discontinued), and that an investigation be undertaken surrounding the camera's installation, which information the Union requested be shared with it.

At arbitration the Union seeks a declaration that the Company violated Agreement 4.3 and *PIPEDA* by installing the camera in the circumstances described above.

The relevant provisions of the collective agreement and *PIPEDA* are as follows:

Article152 of agreement 4.3 reads:

Workplace Environment

> 152.1 Management agrees it must exercise its rights reasonably. Management maintains it ensures a harassment free environment. An employee alleging harassment and intimidation by management may submit a grievance to the General Chairperson to be progressed by the General Chairperson at his or her discretion. An employee subject to this agreement may, without prejudice elect to submit a complaint under CN's harassment free environment policy."

With respect to *PIPEDA,* the following clauses are at issue (given the parties' agreement that the information that can be gathered through conducting surveillance in the booking-in room is, by definition, employees' personal information):

> DIVISION 1
> PROTECTION OF PERSONAL INFORMATION
>
> ….
>
> 5 (3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.
>
> ….
>
> 7. (1) for the purpose of clause 4.3 of schedule 1, and despite the note to the than accompanies that clause, an organization may collect personal information without the knowledge or consent of the individual only if:
> …
> (b) it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for the purposes related to investigating a breach of an agreement or contravention of the laws of Canada or a province.
> ….

As a preliminary matter, the Company takes the position that the issue raised by the grievance is moot. Alternatively, it submits the installation of the camera for the purpose of undertaking surreptitious surveillance in the booking-in room was a reasonable exercise of management rights and does not violate *PIPEDA*.

Is the Grievance Moot ?

The Company says that the remedies sought in March 2013 have been satisfied: the camera has been removed, and the Union has been given the information surrounding its installation.

The Company argues that the arbitral process should not be used for the determination of what it calls a theoretical issue (see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342).

I cannot accept the Company submission. It has remained steadfast in its position that it acted in accordance with the collective agreement and *PIPEDA* when it had a security company install the camera for the purpose of undertaking covert surveillance in the booking-in room.

Whether the Company was entitled to act in the manner it did is not a theoretical issue as asserted by the Company. Its decision to proceed in the manner described above, and whether it was entitled to do so, will continue to influence its decisions. Accordingly, the determination I am to make is a real one. It will have the effect of resolving a matter of serious importance which affects the rights of the parties – in

particular the employees' privacy right to be free of surreptitious surveillance except in certain circumstances.

Did the Company Violate article 152 of the 4.3 Collective Agreement?

I turn now to the Company's submission that the installation of the camera was reasonable and appropriate and therefore consistent with article 152 of Agreement 4.3.

It is apparent from the facts recounted above, that Superintendent Hart, without any consideration as to alternative ways of addressing ER's complaint or the Company's more general obligation to ensure a harassment free environment, immediately responded by deciding to undertake surreptitious surveillance in the booking-in room. That was not a reasonable response.

The Company was obliged to investigate ER's harassment complaint. However, in my view, the surveillance was not likely to assist the Company in determining who posted the note and whistle and whether that person was targeting ER. The surveillance was not likely to result in probative evidence of the perpetrator of the posting of the note and the whistle. There was no reason to believe that the perpetrator of would repeat his or her conduct.

My view is that the Company had an obligation to assess ER's complaint before taking the drastic step of conducting covert surveillance. Instead it adopted a privacy-invasive measure that, as stated above, would not likely assist in its stated goal.

Among the steps the Company could have taken, it could have opted to interview ER to find out about the rape, who might have known about it, and who might have had reason to harass him about it. That is to say, the Company could have asked questions to understand the link (a tenuous one based on the Company's information) ER had made between his assault and his determination that he was being targeted by the posting. That may have helped the Company determine appropriate next steps in an investigation.

The Company could also have made inquiries of staff who spent significant time in the booking-in room in and around the time of the posting to ask whether they had any knowledge of the identity of the person who had posted the note with the whistle attached.

Finally, since ER's concern was the possibility of additional harassment, the Company could have taken measures, ideally with the Union's involvement, to address the posting with its employees, thereby putting them on notice that the Company was aware of it, that such postings are not acceptable and that it would be investigating the matter.

Finally, the Company should have taken into account that, in the five week period between the reporting of the incident by ER and the installation of the camera, there had not been a further single incident of alleged harassment.

Did the Company violate *PIPEDA*?

The parties agree that the information that was intended to be gathered by the surveillance camera is personal information under *PIPEDA*. Further, there is no disagreement that under *PIPEDA* the Company is bound to obtain consent from individuals before obtaining and handling their personal information, and that there was no consent obtained in this case. Finally, the parties agree that there is a four-part test governing the "appropriate purposes limitation" under section 5(3) of *PIPEDA*.

The four-part test was endorsed by the Federal Court and adopted by Arbitrator Picher in **CROA 3900**. Those elements reflect a balancing of interests between privacy interests of employees with the legitimate business interests of employers. They are as follows:

1. Is the measure demonstrably necessary to meet a specific need?
2. Is it likely to be effective in meeting that need?
3. Is the loss of privacy proportional to the benefit gained?
4. Is there a less privacy invasive way to achieve the same end?

For the reasons set out above, the decision to collect surreptitious video surveillance in the circumstances is not appropriate. As stated above, the surveillance was not likely to assist the Company in determining who posted the note and whistle and whether that person was targeting ER.

I do not agree with the Company's argument section 7 (1)(b) of *PIPEDA* applies. The Company was not investigating any breach of an agreement, or the contravention

of provincial or federal laws. The Company was investigating an allegation of harassment.

For all of these reasons, by installing a camera to undertake surreptitious surveillance in the book-in room the Company violated article 152 of the collective agreement and *PIPEDA* and I so declare.

March 25, 2014

CHRISTINE SCHMIDT
ARBITRATOR