CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2302
Heard at Montreal, Wednesday, 11 November 1992
concerning
CANADIAN PACIFIC EXPRESS & TRANSPORT
and
TRANSPORTATION COMMUNICATIONS UNION
EX PARTE
DISPUTE:
A matter involving the termination of employee, Victor Godler, on or about June 18th, 1992 for ``attempting to secure Worker's Compensation benefits through fraudulent means.''
UNION'S STATEMENT OF ISSUE:
The Union, during the grievance process, raised the cogent argument that it's position should logically succeed given that the Company failed to discharge the requisite burden of proof with respect to their allegations that this employee ``attempted fraud''.
The Union contends it is clear and evident that the Company relied solely on a ``video tape'' taken of the grievor while residing at his home address. The Union has repeatedly requested that the Company provide a copy of this video, given that it was the only evidence introduced against the grievor and has been subsequently ignored in this request by the Company.
The Union contends the Company has clearly violated the terms of Article 8.8 of the current collective agreement by not providing a copy of this ``video''. Additionally, the Union is requesting that the arbitrator bar the Company's introduction of this video tape during or at the time this matter is heard.
To date, the Company has declined the Union's request, therefore, the Union is respectfully requesting that the grievor be properly reinstated with full compensation and that he suffer no loss of seniority, nor benefits.
FOR THE UNION:
(SGD.) M. W. FLYNN
EXECUTIVE VICE-PRESIDENT
There appeared on behalf of the Company:
P. A. Young
Counsel, Toronto
B. F. Weinert
Director, Labour Relations, Toronto
J. H. Barrett
Regional Manager, Western Canada Linehaul, Vancouver
L. Capricci
Regional Loss Prevention Manager, Wester Canada, Vancouver
G. Cull
Witness
And on behalf of the Union:
H. Caley
Counsel, Toronto
V. Godler
Grievor

AWARD OF THE ARBITRATOR

The facts material to this grievance are not in dispute. The grievor was employed as a tractor trailer city driver out of the Company's Vancouver terminal in May of 1992, when he advised his supervisor, Mr. Shane Thompson, that he had sustained a lower back injury picking up an object while at work. It is common ground that he had previously suffered a back injury for which he had been absent from work for an extensive period of time, and in respect of which he is in receipt of a 5% permanent partial disability pension.

Mr. Godler filed a claim for Workers' Compensation benefits for the period of his absence commencing May 11, 1992. It is not disputed that in May and June of 1992 Mr. Godler was under the care of his doctor and a physiotherapist, and attended physiotherapy sessions for his back injury, initially three times a week, and twice weekly thereafter.

During the course of his absence, in late May it came to the employer's attention that Mr. Godler had been observed working for substantial periods of time in the construction of a deck at the rear of his home. The record before the Arbitrator indicates that he was first observed by an inspector employed by the Workers' Compensation Board of British Columbia on or about May 29, 1992. The report of the Claims Adjudicator who denied the grievor's application for W.C.B. benefits contains the following entry:

QQINDENT... I spoke with you on June 5, 1992 and you indicated that since returning to work approximately 5 months ago under your previous claim, you did have some discomfort in your low back, but it was manageable. Your current work would not be described as being physically demanding and there was no heavy lifting involved. Further, in our conversation, you indicated that you are getting a bit better, but very slowly and you see your doctor every 2 weeks and you are receiving physiotherapy twice per week. Your doctor advised you to rest at home with limited activity, which you stated you had been doing. You stated that you had been doing virtually nothing, either inside or outside the home, other than going for very short, slow walks.

QQINDENTInformation on file indicated that you were able to do more activities than you claimed and accordingly, arrangements were made for one of the Board Field Investigation Officers to observe your activities, and subsequently meet with you. You were observed on May 29, 1992 performing activities necessary to constructing a patio. These activities included crouching, picking up a large cement block, turning and walking with the block in front of you, and dropping it into a hole under your deck, kneeling, bending for periods of time while working on the deck, digging, cutting boards, and kneeling to nail the railings in place, which included twisting to nail underneath. No apparent limitations of movement were observed or any pain behaviour. In discussion with the Field Officers on June 12, 1992, you indicated that you did not feel totally disabled, but that you could not sit still and you had to do something and hence, you felt you were able to work to a minor extent in the backyard. You confirmed that your doctor and physiotherapist were unaware of your activities.

The report of the Claims Adjudicator goes on to find that the occurrence of an acute personal injury on May 11, 1992 was not proved, as was evidenced, in part ``... by your continued physical activities while at home.''

Mr. Godler was separately observed performing work in the construction of his deck by a private investigator retained by the Company. The surveillance took place on June 3, 1992 resulting in a video tape of the grievor's activities between approximately 9:00 a.m. and 1:15 p.m. that day.

On June 15, 1992 Mr. Godler was interviewed by Company officers, in the presence of his union representative. Initially, questions were put to him concerning his physical state. Among other things, he responded ``I can bend, but very slowly, there is some pain. Lifting is no problem, but I can't twist or turn when lifting. I have to straighten up and then move my feet, I can't twist while lifting without some pain. Squatting is not easy, very slow.'' Mr. Godler further stated that he could not move about or stand for extended periods of time without pain or discomfort. When asked whether his restrictions would affect his ability to perform his normal duties at work he responded ``prolonged sitting, and my back would not be able to handle a full day of work without getting tired or causing pain.''

Mr. Godler was then shown a twenty minute excerpt of the video tape taken by the private investigator, which showed him performing numerous tasks in the construction of the deck at his home, including hammering, sawing, lifting boards, bending, squatting, twisting, operating a circular saw which he lifted with one hand on several occasions and a number of other tasks incidental to carpentry work. Following the presentation of the video tape material Mr. Godler and his representative declined to provide any comment to the Company, advancing the position that to do so might prejudice his position with respect to his application for Workers' Compensation benefits. Mr. Godler was subsequently discharged for misleading the Company by providing erroneous information and having ``... breached the fundamental trust which exists between employer and employee.''

As a preliminary matter Counsel for the Union submits that the surveillance video tape should not be admitted as evidence in these proceedings. He bases his position on two grounds. Firstly, he submits that what occurred was an unwarranted transgression on the privacy of Mr. Godler in contravention of the British Columbia QQBOLDPrivacy Act,QQBOLD R.S.B.C. c.336. In support, Counsel points the Arbitrator to the decision of the board of arbitration in QQBOLDDoman Forest Products Ltd.QQBOLD (Preliminary Award) (1990) 13 LAC (4th) 275 (Vickers). Secondly, Counsel submits that the video tape evidence should not be admitted because a copy of the video tape was not initially provided to the grievor or the Union following the interview of June 15th. This, Counsel argues, is in violation of the requirement found in Article 8.8 of the collective agreement, whereby the Company is to provide copies of all documentation.

I deal firstly with the objection in respect of Article 8. It provides, in part, as follows:

QQINDENT8.2 QQINDENTWhenever an employee is to be interviewed by the Company, with respect to his/her work or his/her conduct in accordance with Article 8.1, an accredited Union Representative must be in attendance, and the employee shall be advised in writing of such interview, including notice of the subject matter of the interview. Such interview must be held within fourteen (14) calendar days from the date the incident became known to the Company, unless otherwise mutually agreed. In the event an accredited representative is not reasonably available, a fellow employee, selected by the employee to be interviewed, shall be in attendance. Nothing herein compels an employee to answer any questions.

QQINDENT8.4 QQINDENTWhenever a person is interviewed by the Company and the statements of such person are to be used in any proceeding that relate to the disciplining or dismissal of an employee, such employee and his/her Union Representative shall be entitled to be present at such interview and ask questions as are felt appropriate, or read the evidence of such witness and offer rebuttal to such statements.

QQINDENTQQINDENTFailure to comply with this Article shall result in the Company not being able to rely upon the statements of such person(s) in any proceedings.

QQINDENT8.8 QQINDENTCopies of all documents rendered as per Article 8.2 shall be given to the employee and the Local Protective Chairman, within four (4) working days following the interview.

The evidence before the Arbitrator confirms that the Company's officers indicated to the grievor and to his Union representative that while the Company had only a single copy of the video tape, it remained available to the grievor and his Union to view at any time, if and when they so desired. It appears that, in fact, no request to view the video tape was made. Subsequently, albeit only shortly before the arbitration hearing, a copy of the tape was provided to the Union.

A first issue is whether the video tape would qualify as a document within the contemplation of article 8.8 of the collective agreement. If so, the Company would have been under an obligation to give a copy to the grievor within four working days of the interview of June 15, 1992. I think that in the broadest sense it can be said that video tapes, like photographs, sketches, blue prints or other forms of graphic communication, can be described as documents or documentation. To so conclude, however, would not necessarily dispose of the objection in a manner favourable to the Union in the circumstances of this case.

Article 8.8 of the collective agreement must, like any part the agreement, be interpreted in a reasonable and purposive fashion. The obligation contained therein is that the employee ``be given'' copies of all documents. In the case at hand it does not appear disputed that at or about the time of the interview there was only one copy of the video tape in existence. The Company's officers then made it clear to the grievor and his Union representatives that they could have full and unrestricted access to view the tape whenever they wished. That undertaking was then augmented by the actual providing of a copy of the tape in advance of the arbitration hearing.

While the matter is not without some difficulty, I am inclined to conclude that there was, in all of the circumstances, substantial compliance with the requirements of article 8.8 of the collective agreement. During the four day period in question the Company took all reasonable steps to provide the video tape to the grievor and his Union representative for their use, insofar as that could practically be done. Moreover, it is less than clear from the overall language of article 8 of the agreement that failure to comply with the four day deadline must necessarily be fatal to the investigation or to the admission of the document in question at a subsequent time. If it were necessary to do so, I would find that the requirement is directory rather than mandatory, as no specific consequence for noncompliance is articulated, as is the case in article 8.4. For the purposes of this award, however, I need make no determination in that regard, as I am satisfied that there was substantial compliance. On the whole, therefore, I cannot sustain the objection taken by the Union with respect to the application of article 8 of the collective agreement as it relates to the video tape.

Nor can I sustain the objection with respect to the application of the British Columbia QQBOLDPrivacy ActQQBOLD. That statute provides, in part, as follows:

QQINDENT1. QQINDENT(1) QQINDENTIt is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

QQINDENTQQINDENT(2) QQINDENTThe nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others.

QQINDENTQQINDENT(3) QQINDENTIn determining whether the act or conduct of a person is a violation of another's privacy, regard shall be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

The Arbitrator has heard no submissions as to the application of the above provincial statute to the grievance at hand, which falls under federal jurisdiction. Assuming, without necessarily finding, that the statute can be brought to bear in the collective bargaining relationship of parties governed by the QQBOLDCanada Labour CodeQQBOLD, I am not persuaded that it should apply to exclude the evidence obtained by surveillance of the grievor in this case. Firstly, insofar as the statute purports to establish a head of tortious liability, its purpose and application are plainly beyond the scope and jurisdiction of this tribunal. Accepting, for the purpose of argument, that it can be taken as a statement of public policy which bears on the admissibility of evidence, the Arbitrator is still not persuaded that it should be viewed as a compelling basis to exclude the video tape evidence obtained in the case at hand.

It is common ground that as a Schedule II employer, the Company was liable to pay, out of its own funds, any Workers' Compensation benefits which might be obtained by Mr. Godler for the period of absence following his injury of May 11, 1992. It is not disputed that the Company was in possession of information which, by any reasonable standard, gave it reasonable and probable cause to suspect that the grievor's claim was being made fraudulently. In my view, in the words of the QQBOLDPrivacy ActQQBOLD, if due regard is had to the lawful interests of the employer, and to the special relationship between the parties, it is, to say the least, arguable that the Company should have been entitled to take reasonable steps to protect itself, so long as it did not do so by a means that was overly intrusive. This is not a case of random or speculative surveillance where the employer did not have reasonable and probable cause. Significantly, on May 29, 1992 a branch of the government of British Columbia, the Workers' Compensation Board, itself found it appropriate to engage in surveillance of Mr. Godler's activities, before the Company chose to do so. If it were necessary to so conclude, I would find that the relationship of both the W.C.B. and the employer to the grievor was such as to justify the action taken. For these reasons the objection of the Union with respect to the admissability of the video tape must be dismissed.

Regrettably, the Arbitrator cannot accept the characterization of what transpired as an error of judgement on the part of Mr. Godler. The evidence discloses that he made no attempt to clear his physical activities either with his physician or his physiotherapist, and indeed did not inform them of what he was doing. Similarly, his answers to questions put to him by the Company can only be construed as deliberate deception and concealment of his activity. Moreover, the evidence viewed at the hearing discloses that the activities engaged in by Mr. Godler were plainly inconsistent with all of his claims of back pain and highly restricted movement. The video tape shows him working at a brisk pace, lifting objects while standing, and while bending and placing himself in awkward positions such as squatting and twisting for significant periods of time. On the whole, it is impossible to square the visual evidence of his activities on June 3, 1992 with his verbal account of his physical condition to the Company's supervisors during the course of his interview on June 15, 1992.

With the greatest respect to the arguments made on behalf of the grievor, this is not a case of error of judgement. It can only be fairly described as a case of deliberate deception, compounded by indications that to the present the grievor appears not to understand the seriousness of his actions and inconsistencies.

On the whole, having regard to the evidence reviewed, the Arbitrator cannot conclude that the decision of the Company to terminate the grievor was unreasonable in the circumstances. For these reasons the grievance must be dismissed.

November 13, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR