CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2707

Heard in Montreal, Thursday, 15 February 1996

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Dismissal of Mr. S. Chahal.

COMPANY'S STATEMENT OF ISSUE:

On September 25, 1995, the grievor was dismissed for "deliberately misrepresenting yourself to the Company as being physically incapacitated and unable to perform your normal duties due to a work related back injury, and then personally engaging in physically demanding activities during a time frame in which you had put forth a claim to the Workers' Compensation Board; a deliberate, calculated and willful attempt to mislead and defraud the Company, June and July of 1995, at Calgary, Alberta."

The Union contends that the dismissal of the grievor is excessive and unwarranted in the circumstances.

The Union requests that the grievor be reinstated forthwith without loss of seniority and with full compensation for all earnings lost, including expense unnecessarily incurred.

The Company denies the Union's contentions and declines the Union's request by arguing that the grievor misrepresented himself and his ability to work in an attempt to defraud the Company.

FOR THE COMPANY:

(SGD.) R. M. ANDREWS
FOR: DIRECTOR OF TRACK PROGRAMS

There appeared on behalf of the Company:

R. M. Andrews	– Labour Relations Officer, Vancouver
D. T. Cooke	– Manager, Labour Relations, Montreal
G. D. Wilson	– Counsel, Montreal
D. M. Ciseski	– Claims Agent, Calgary
K. C. Hood	– Private Investigator, Calgary

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D.W. Brown	– Senior Counsel, Ottawa
R. Heinrichs	– General Chairman, Prairie Region
G. Beauregard	– General Chairman, Atlantic Region

AWARD OF THE ARBITRATOR

This grievance involves a dispute concerning the admissibility of evidence acquired by the videotape surveillance of an employee in his off-duty activities. The grievor, Machine Operator S. Chahal, who is thirty-five years old and was employed by the Company since August of 1982, complained of a back injury which he maintains he sustained at work on June 20, 1995. That day was the first seasonal day back at work for the Pacific Steel Gang, and the grievor was assigned to install pandral clips with other labourers. He complained of a sore back at approximately 13:00, following which he rested in the crew bus and, thereafter, was put on light duties. When, the following day, he stated that his back was too sore to work, he was allowed to remain off work entirely.

The next day, June 22, 1995, he was taken to a medical clinic in Revelstoke, B.C., by Assistant Supervisor Dan Spalding. Mr. Spalding relates that during the course of that trip the grievor had substantial difficulty walking and getting into and out off the Company truck. The doctor at Revelstoke diagnosed the grievor as having a strained lower back and recommended light duties for a couple of days. The following day, June 23, 1995, Mr. Chahal advised his supervisor that the pain in his back was getting worse and, apparently on his own, obtained a ride to Golden, B.C., where he visited a different doctor who, it appears, advised against any light duties for a couple of days. The record further discloses that on Saturday, June 24, 1995, Assistant Supervisor Spalding looked out of the window of his own boarding car and saw the grievor walking by on his way to the diner car. He relates that at that time the grievor showed no signs of discomfort or disability in the way he was walking.

As the grievor's back complaint persisted, Mr. Spalding was directed by Supervisor Scott to take Mr. Chahal back to a doctor on June 26, 1995. Based on that instruction, Mr. Spalding accompanied the grievor to the Revelstoke Medical Clinic where he was seen by Dr. Battersby. It appears that at the conclusion of that appointment Dr. Battersby indicated to Mr. Spalding that he should contact Dr. Battersby by telephone at some later time. The doctor told the grievor that he should return home to Calgary for physiotherapy, as remaining idle at the work site would not be constructive. Subsequently, Mr. Spalding gave Dr. Battersby's business card to Deputy Supervisor Dale Winkler who indicated that he would call the doctor. He did so, as indicated in a memo from Deputy Supervisor Winkler, dated June 27, 1995. That memo reads, in part, as follows:

> ... I contacted Dr. Buttersby [sic] by phone. Dr. Buttersby informed me that he preformed [sic] some tests on Mr. Chahal. Some of the tests he performed had nothing to do with regular back tests. But Mr. Chahal acted on these tests. The doctor said, "he should of [sic] had no reaction to these tests." The doctor said, "that he felt Mr. Chahal was pulling a scam, that there was nothing wrong with him as reported in his note and by the doctor previous day." ...

During the course of the arbitration hearing the Brotherhood objected to the admission of this information. In part, its Counsel submits, it should not be admitted as it represents an arguable violation of doctor-patient confidentiality. The Arbitrator is aware of no rule by which such evidence, once tendered, should be ruled inadmissible. The law of evidence does not recognize a privilege in respect of information between patient and doctor. Moreover, it would appear that, in substance, Dr. Battersby was acting in the position of a physician retained by the Company to assess the grievor's fitness to safely return to work. Even if in that circumstance, the doctor might owe the patient an obligation of full disclosure of the same information he related to the Company, that would not appear to go to the admissibility of the evidence in question. It is, moreover, less than clear to the Arbitrator that, in any event, privilege could be invoked, as a matter of principle, in respect of such information, if the purpose of invoking the privilege would be to mask some illegality or fraud. I am not certain that Dr. Battersby can be said to have violated an ethical rule, any more than a psychiatrist who, during the course of therapy, might disclose that he or she has become aware of a patient's intention to cause bodily harm to another. I would consider this information admissible, on that basis alone. Moreover, in the alternative, it is admissible not for what it might prove as to whether the grievor was in fact malingering, but to prove the very pertinent fact of the Company's state of mind as it considered what action it might appropriately take to deal with the grievor's case. Therefore, even if it is arguable that such evidence should not be admitted to prove the allegation of fraud against Mr. Chahal, a position I would be inclined to reject, it must be admitted as evidence going to the issue of whether the Company was justified in taking the actions which it subsequently did.

Before turning to the actions which the Company decided to take, one further fact should be related by way of background. The evidence discloses that on a previous occasion, apparently in 1991, Mr. Chahal had made a

Workers' Compensation Board (WCB) claim for an alleged on-the-job injury. During the course of the processing of that claim it appears Mr. Chahal was found to have provided false information to the WCB, in relation to his involvement in owning and operating a video rental store. On that basis his WCB claim was rejected. Further, the Company was aware of a long record of absenteeism caused by on-the-job injuries in the grievor's work history. It appears that he suffered an on-the-job injury which resulted in his receipt of either Workers' Compensation benefits or SunLife indemnity payments in virtually every year since he was hired by the Company. It is not disputed that the SunLife indemnities received by Mr. Chahal over the years for time off work totalled approximately seventeen months.

In the result, based on the observations of Mr. Spalding, the information provided by Dr. Battersby, the prior incident of false information being provided to the Workers' Compensation Board and the grievor's unusually high record of work related injury claims, the Company decided to retain the services of a private investigator to observe Mr. Chahal's activities, to either confirm or rule out its suspicions about the legitimacy of his injury claim. The videotape which resulted from that investigation was tendered as evidence at the hearing.

The Brotherhood objected to the admission of that evidence. Its Counsel submits that, for reasons established in Canadian arbitral jurisprudence, the surveillance of the grievor in the circumstances of this case was not justified, and was in violation of his right to privacy. Counsel for the Brotherhood submits that that is the law as reflected in the following arbitration awards: **Re Doman Forest Products Ltd., New Westminster Division and International Woodworkers, Local 1-357** (1990), 13 L.A.C. (4th) 275 (Vickers); **Re Steels Industrial Products and Teamsters Union, Local 213** (1991), 24 L.A.C. (4th) 259 (Blasina); **Re Toronto Star Newspapers Ltd. and Southern Ontario Newspaper Guild, Local 87** (1992), 30 L.A.C. (4th) 306 (Springate); **Re Labatt Ontario Breweries (Toronto Brewery) and Brewery, General & Professional Workers Union, Local 304** (1994), 42 L.A.C. (4th) 151 (Brandt); **Re Alberta Wheat Pool and Grain Workers' Union, Local 333** (1995), 48 L.A.C. (4th) 332 (Williams) **CROA 1850**, reported as **Re Canadian National Railway Co. and B.M.W.E.** (1988), 2 L.A.C. (4th) 92 (M.G. Picher) and **CROA 2302**.

Based on the above awards, the Brotherhood submits that there must be a balancing of interests as between the grievor's right to privacy and the Company's right to information about his activities which might be inconsistent with his claim for indemnity payments or for Workers' Compensation benefits, which in the instant case were eventually denied. Based on the decision of Arbitrator Vickers in the **Doman Forest Products** case, Counsel for the Brotherhood stresses that three requirements should be satisfied before the Company can resort to the electronic surveillance of an employee in his or her off-duty activities. First, there must be reasonable and probable cause for the Company's actions. Second, the surveillance must not be implemented in an unreasonable fashion. Third, it is submitted that the Company must have considered and exhausted alternative means of obtaining the information, including confronting the employee directly. Counsel also notes that the cases indicate that in many circumstances it will be necessary for an employer to first exhaust with an employee the possibility of performing modified duties, although it appears that in the instant case that was in fact done.

The Company's representative submits that in the case at hand there was ample reason to resort to surveillance of Mr. Chahal's activities during the time he was off work for his alleged back injury. In that regard he points to the information made available to the Company through Mr. Spalding and Dr. Battersby, coupled with the Company's own concerns about the prior pattern of regular annual absences related to on-the-job injury involving the grievor, and at least one prior instance in which a claim for Workers' Compensation benefits made by him was disallowed because of false information which he provided to the Workers' Compensation Board in respect of his involvement in the operation of a private business. In all of these circumstances, it is submitted, it was neither realistic nor reasonable to expect the Company to convey to Mr. Chahal its suspicions that he was engaged in a course of deliberate fraud. Further, the Company's representative notes that the grievor's supervisors did exhaust with him the possibility of performing modified duties, which he said he could not do, and that it did so not only at the time of his injury, but also in late July of 1995, as reflected further in the facts related below.

At the hearing the Arbitrator reserved on the objection of the Brotherhood with respect to the admissibility of the videotape, and, following the practice reflected in the awards cited above, allowed the videotape to be presented, subject to an ultimate ruling as to its admissibility. Having considered the submissions of the parties and having closely reviewed the jurisprudence, I am satisfied that the videotape should, in the case at hand, be ruled to be admissible, for the reasons now related.

Labour boards and boards of arbitration have long recognized the need for a respect of the privacy of employees, both on and off the job, in keeping with a fundamental respect for human dignity. One of the contexts in which the issue has arisen is the circumstance in which a union alleges that company's surveillance of its members constitutes an unfair labour practice. In the **Toronto Star** case Arbitrator Springate was faced with that allegation, relating to the videotape surveillance of employees engaged in picket line activity during the course of a lawful strike. In that case the arbitrator found that the videotape evidence, which was being presented to support the company's case for discipline assessed against the grievor, was admissible, if it could be shown that the video accurately reflected the facts, that it was a fair document prepared without any intention to mislead, and if its authenticity was appropriately verified. In considering the unfair labour practice dimension of undue surveillance, Arbitrator Springate adverted to the decision of the Ontario Labour Relations Board in **K-Mart Canada Ltd. (Peterborough) and SEIU, Local 183** (1981), C.L.L.C. ¶16,084, [1981] O.L.R.B. Rep. Jan. 60, where the following appears, at p. 313:

> In this case the Board must first consider the impact of the open and continuous surveillance of two employees who were the spearhead of the union organizing campaign. Spying on employees is not new to the catalogue of unfair labour practices resorted to by employers who are extreme in their determination to stop their employees from exercising their collective bargaining rights. This Board has previously found instances of covert surveillance to be unlawful interference with the rights of employees under the Act; (see, for example, *Radio Shack*, [1979] OLRB Rep. Mar. 248 [80 CLLC ¶16,003]). In its very first reported decision the National Labour Relations Board was confronted with the tactic of surveillance as a method of discouraging union activity. From that time to the present, with the endorsement of the Courts, the NLRB has consistently found surveillance or the attempt to create the impression of surveillance of union activity to be unlawful interference with the rights of union association expressly protected by law; (see, *Pennsylvania Greyhound Lines Inc*. 1 NLRB 1 (1935) at p. 22; *A.& R. Transport Inc. v. N.L.R.B.* 101 LRRN 2856 (C.A. 7, 1979) and the *Delchamps* and *Redwing* cases, *supra*).

The surveillance referred to in the *K-Mart* case involved management trainees constantly following two employees who were the in-plant leaders of a union organizing campaign. In its decision the board indicated as follows at p. 14,732 that in other circumstances surveillance can legitimately be used in the work place:

> Surveillance can have a legitimate application in the work place. An employer may, for example, have to use one form or another of surveillance to protect its property against theft and vandalism or to monitor machinery and processes to ensure the safety of employees. In Ontario, however, an employer may not use surveillance to intimidate employees from exercising their rights under *The Labour Relations Act*.

With respect to the general principles which govern surveillance, having considered the awards in **Doman Forest Products and Steels Industrial Products** as well as **Re Puretex Knitting Co. and Canadian Textile & Chemical Union** (1979), 23 L.A.C. (2d) 14 (Ellis); **Re U.A.W., Loc. 704 and Ford Motor Co. of Canada Ltd.** (1971), 23 L.A.C. 96 (Weatherill) and **Re Liberty Smelting Works (1962) Ltd. and U.A.W., Local 1470** (1972) 3 S.A.G. 1035 (Dulude), Arbitrator Springate commented as follows, at p. 312:

> The above cases indicate that an employer generally does not have the right to intrude on an employee's privacy by videotaping his or her conduct. An employee's right to privacy, however, is not absolute and in certain circumstances the employer's interests may outweigh an employee's right to privacy. In order for an employer to establish that this is the case, it must demonstrate that it was reasonable for it to resort to surveillance and also that the surveillance was conducted in a reasonable manner. In the instant case I will only be able to determine whether or not these conditions have been met after I have heard evidence relating to why and how the videotape was made.

The decision of Arbitrator Brandt in **Re Labatt Ontario Breweries** involves an exhaustive review of the jurisprudence in the area of employee surveillance. He notes, among the awards, the line of cases arising from the efforts of employers to seek, sometimes unduly, to search the personal effects and lockers of employees in the workplace, as well as to subject employees to medical examinations in circumstances which are not justified. At pp

161-63 he also reflects on the extension of the same principles to the area of surveillance of an employee's off-duty activities:

> Most of those cases involve challenges to the right of an employer to search the person or the personal effects of employees where theft is suspected. In such cases, arbitrators have held that in the absence of an express or implied term in the collective agreement there is no absolute right to search employees or their personal effects and their right of privacy must be respected; that the employer's right to investigate suspected wrongdoing must yield to the employee's right to personal privacy unless there is a real and substantial suspicion of wrongdoing and only so long as the search is conducted reasonably (see *Re University Hospital, supra; Re Accuride Canada and C.A.W., Loc. 27* (1992), 29 L.A.C. (4th) 137 (Welling); *Re U.A.W., Loc. 386 and Comco Metal Products Ltd*. (1972), 23 L.A.C. 390 (H.D. Brown); *Re Royal Oak Mines Inc. and C.A.S.A.W., Loc. 4* (1991), L.A.C. (4th) 221 (Bird)).
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> Privacy interests have also been recognized to prevent an employer from requiring an employee, suspected of drug use, to undergo drug testing (*Re C.H. Heist Ltd. and E.C.W.U. Loc. 848* (1991), 20 L.A.C. (4th) 112 (Verity); *Re Provincial-Americal Truck Transporters and Teamsters Union, Loc. 880* (1991), 18 L.A.C. (4th) 412 (Brent)) or submit to an accident investigation of an event occurring during off-duty hours (*Re Bell Canada and Communications Workers of Canada* (1984), 16 L.A.C. (3d) 397 (P.C. Picher)). In addition, arbitrators have declined to find employees insubordinate where they have refused to deliver a medical form to their own physician or to submit to a medical examination against their will or by a physician not of their own choosing (*Re Riverdale Hospital and C.U.P.E., Loc. 79* (1985), 19 L.A.C. (3d) 396 (Burkett); *Re Canadian National Railway Co. and B.M.W.E.* (1988), 2 L.A.C. (4th) 92 (M.G. Picher)).
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> In all of these cases arbitrators have sought to balance the employee's interest in personal privacy against the right of the employer to manage the enterprise. Some employee interests may be valued more highly than others. For example, the right of the employee to be free from intrusive searches and his/her physical person may be considered to be more valuable than a search of personal effects or of company property (such as lockers) where the employee keeps his/her personal effects. Similarly, some employer interests, such as the prevention of theft, may be valued more highly than others. Also relevant is the nature of the "search" undertaken whether it is conducted in a reasonable manner with due regard for the legitimate interests of the employee in the circumstances.
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> Thus, while the law does not permit an arbitrator in Ontario (in contrast to British Columbia) to find a right to privacy based on the Charter, there nevertheless remains a substantial body of arbitral case law recognizing the existence of privacy interests deserving of consideration apart from the Charter. The cases involving video surveillance all appear to have been based on Charter arguments probably because the leading case, *Doman Forest Products Ltd*., followed that analysis. However, I see no reason in principle why a consideration of the propriety of video surveillance should be limited to Charter arguments only. Although the technique used is different from that used in the ordinary search cases it nevertheless constitutes an interference with the employee's interest in not having his activities surreptitiously observed. In this regard it is significant that the provision of the Charter that is alleged to be offended in these cases is that protecting the individual against "unreasonable **search** and seizure". [original emphasis]

Both the **Doman Forest Products** case and the **Steels Industrial Products** case must be understood as influenced, at least in part, by the provisions of the **Privacy Act** of British Columbia, R.S.B.C. 1979, c. 336 which governed in the jurisdiction where those cases were heard. That statute makes it an actionable tort "... for a person, willfully and without a claim of right, to violate the privacy of another." Section 1(2) of the **Act** reads as follows:

> **1 (2)** The 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 interest of others.

> **1 (3)** In 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.

At p. 282 of the **Doman Forest Products** case Arbitrator Vickers considered, among other cases, the decision of Arbitrator Bird in **Re Canada Post Corp. and C.U.P.W.** (fingerprinting grievance) (1988), 34 L.A.C. (3d) 392, suggesting that an employee's right of privacy could only be curtailed by express contractual language, and commented at p. 281-82 as follows:

> I accept that an employee has a right to freedom of privacy, but I do not need to go as far as the language in *Re Canada Post*. In my opinion, it is a balancing of interests that is required. The employee's right to privacy weighed against the company's right to investigate what it might consider to be an abuse of sick leave. Questions to be answered include:
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> (1) Was it reasonable, in all of the circumstances, to request a surveillance?
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> (2) Was the surveillance conducted in a reasonable manner?
>
> (3) Were other alternatives open to the company to obtain the evidence it sought?

Arbitrator Blasina agrees with Arbitrator Vickers in respect of the issue of balancing interests and, at pp. 276-77 of the **Re Steels Industrial Products** case expresses the following view of the principles to be applied:

> I agree that the question of whether or not to admit video surveillance is one of balancing interests. I would not think that the right to privacy and the employer's right to investigate are necessarily equally weighted, particularly in the area of surreptitious surveillance. An arbitrator must make a qualitative assessment and he would have to be satisfied that in the circumstances the employer's interest reasonably outweighs the employee's right to privacy – and, indeed, a free society's interest that all individuals can live in privacy without undue or unnecessary monitoring by a third party. The analysis of the problem, in my view, can be encompassed in the first two questions posed by arbitrator Vickers, namely:
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> (1) Was it reasonable, in all of the circumstances, to request a surveillance?
>
> (2) Was the surveillance conducted in a reasonable manner?
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> The third question posed by arbitrator Vickers can be considered as part of the first. If the answer is "no" to either question, then the evidence is not admissible.

This Office has had prior occasion to consider what constitutes reasonable and probable cause for an employer to resort to the surveillance of the off duty activities of an employee. In **CROA 2302**, an award involving *Canadian Pacific Express & Transport and the Transportation Communications Union*, dated November 13, 1992, the arbitrator was compelled to consider the admissibility of videotaped evidence of an employee involved in constructing a deck at his private residence at a time when he was claiming Workers' Compensation benefits for an on-the-job back injury which he claimed disabled him from performing the duties of his job. As that case also originated in British Columbia, the union made reference to the **Privacy Act** in support of its submission that the surveillance of the grievor violated his rights and that the resulting videotape evidence should not be admitted. That submission was rejected, with this Office reasoning, in part, as follows:

> 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 **Canada Labour Code** , 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 **Privacy Act**, 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 admissibility of the video tape must be dismissed.

Of the cases presented to the Arbitrator by the Brotherhood, only three resulted in the rejection of videotape evidence by a board of arbitration. Two of those cases, in my view significantly, emanate from British Columbia and appear to be substantially influenced by the impact of the **Privacy Act** of that province. The first is the decision of Arbitrator Vickers in **Re Doman Forest Products Ltd.**, and the second is the award of Arbitrator Williams in **Re Alberta Wheat Pool**, a case which originated in Vancouver. The **Alberta Wheat Pool** case seems, upon close reading, to have been substantially influenced by the award in the **Doman Forest Products** case.

It is important to appreciate that the arbitrator in the **Doman Forest Products** case was met with a set of circumstances which are substantially distinguishable, on the facts, from those in the case at hand. It would appear that Arbitrator Vickers was not persuaded that the prior employment record of the grievor in that case justified recourse to electronic surveillance. Unfortunately, the preliminary decision of Arbitrator Vickers cited above does not involve his final ruling on admissibility, a decision which apparently went unreported. However, some of the rationale for the ultimate ruling can be discerned from the account of the unreported award which appears in the decision of Arbitrator Blasina in **Re Steels Industrial Products** where, at p. 277 the following appears:

> Arbitrator Vickers reserved on deciding the actual issue of admissibility until writing his final award. That decision is dated November 6, 1990, and is unreported. Arbitrator Vickers there ruled that the evidence gathered by the private investigator was inadmissible. Arbitrator Vickers was influenced by a lack of sufficient evidence to warrant surveillance at the outset, and that an alleged deceitful previous WCB claim was not established and had occurred some four years earlier, that the employer's suspicions could have been demystified by asking further questions of the grievor, and that the grievor was a long service employee with no other disciplinary record, such that the employer ought to have confronted him with its concerns.
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> The latter award was remitted to the British Columbia Industrial Relations Council for review under s. 108 [am. 1987, c. 24, ss. 3, 54] of the *Industrial Relations Act*. The council, in decision No. C76/91 (April 17, 1991), upheld the award according to established principles of judicial review of a consensual tribunal without, however, shedding light on the admissibility issue. The council stated:
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> > ... in balancing the rights of the grievor against the rights of the company, the arbitrator struck a balance which favoured the rights of the grievor. Even if this amounted to an error it was clearly an error *within* the jurisdiction of the arbitrator and beyond the reach of this panel. Whether or not this panel would have struck a similar balance is not the issue.
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> Finally, I would comment briefly on arbitrator Vickers' reference to length of service. I do not believe it was arbitrator Vickers' intent to enshrine a greater right to privacy for a long-term employee than for a short-term employee. It appears to me that the length of service was something he viewed as relative to an obligation to confront the employee. In other words, greater length of

> service created a greater moral or ethical imperative to confront the employee directly as opposed to engaging in surreptitious surveillance.

The third reported case in which a board of arbitration declined to admit videotape evidence is the award of Arbitrator Brandt in **Re Labatt Ontario Breweries**. In that case, at pp 164-66, the learned arbitrator goes to great pains to distinguish the circumstances which he had to consider, and those considered by Arbitrator Blasina in the **Steels Industrial Products** case, where the videotape evidence was admitted. In particular, Arbitrator Brandt notes that the grievor before him had not been viewed as particularly notable by the company in respect of previous absenteeism, nor, does it appear, was there any prior instance of the grievor having deceived or misled the employer. As noted at p. 166, the arbitrator finds "... the company had in the past shown no reason to distrust the grievor's reports of his medical condition." Further, on the same page, it is noted that the company made no offer of modified work to the grievor, a possibility which, it would seem, the arbitrator considered should have been explored.

In my view, the instant case is greatly distinguishable from the above cases. It is closer, on the facts, to that considered by Arbitrator Blasina in the **Re Steels Industrial Products** case, where the board ruled that the videotape evidence was admissible. In that case the company advanced evidence that the grievor had previously been duplicitous in the improper use of a work boot allowance, using it to purchase casual western boots, as well as evidence of other incidents reflecting negatively on his general honesty and trustworthiness. At p. 279 Arbitrator Blasina reasoned as follows to conclude that it would have been inappropriate and unrealistic to expect the company to simply confront the grievor with its suspicions:

> I of course had also to consider whether there was sufficient evidence to warrant some form of surveillance from the outset. Was it reasonable for the employer in the first instance to suspect that the grievor was fraudulently away from work? In that regard, the employer was aware of telephone calls being made by the grievor seemingly related to construction work, of rumours that he was engaged in the house construction business, of his name being present on a house construction building permit, of the report to the Workers' Compensation Board indicating that he was not expected to be absent from work, and of his poor attitude generally to his work. Given this context, one cannot blame the employer for suspecting the grievor of abusing his leave.
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> The employer could have elected to simply confront the grievor with its suspicions or to obtain additional information through non-surreptitious means. I do not think it necessary to analyze all the work-related complaints at this stage. But, by recalling the boot allowance incident and the grievor's persistent denials and his accusation that the store had erred, and by recalling his adventurous and non-caring attitude in the incident of damage to company property and again his subsequent denial, and his accusation that Mr. Heinrich had lied, I found that the employer had acted reasonably in choosing to engage surreptitious surveillance. The grievor had demonstrated an attitude in the face of which it would be unrealistic for the employer to rely on responses from the grievor.

It is, of course, true that as a general rule an employer can assert no right as custodian of an employee's private life, away from the workplace. That much is amply reflected in arbitral awards dealing with discipline for non work-related activity, sometimes involving criminal conduct. Even in those cases, however, different considerations come to bear where a legitimate employer interest can be shown to be impacted by an employee's conduct. (*See, generally, Brown & Beatty,* **Canadian Labour Arbitration***, 3rd ed. at para 7:3422*.)

It is also important, I think, to distinguish between the policy considerations which underlie the natural concern courts and administrative tribunals have expressed in respect of the state engaging in excessive forms of surveillance of its citizens, contrary to the **Charter of Rights and Freedoms**, and those which may govern in the more proximate relationship of employer and employee. In this regard, it is notable that the **Privacy Act** of British Columbia itself expressly allows for a weighing of "any domestic or other relationship between the parties," as a factor to be considered in circumscribing the limits of a person's right to privacy. The employment relationship is generally based on the payment of money by the employer to the employee for good consideration, subject to certain well-established conditions. Part of the bargain in many contemporary employment relationships involves the payment by the employer or its insurance carrier of sickness benefits or other forms of insurance or indemnities, short term or long term, when an employee is incapacitated by illness or injury. An employer obviously has a legitimate interest in preventing abuse of that system of employee protection by those who would advance fraudulent claims.

That interest must be fairly balanced with what is becoming recognized as the employee's interest in a respect for his or her personal privacy. The employer's interest does not extend to justifying speculative spying on an employee whom the employer has no reason to suspect will be dishonest. As a general rule, it does not justify resort to random videotape surveillance in the form of an electronic web, cast like a net, to see what it might catch. Surveillance is an extraordinary step which can only be resorted to where there is, beforehand, reasonable and probable cause to justify it. What constitutes such cause is a matter to be determined on the facts of each case. As well, the method and extent of such surveillance must be appropriate to the employer's purpose, and not excessive or unduly intrusive. A legitimate interest in an employee's physical condition might not, for example, justify the covert examination of his or her bank records or other personal information.

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?

This approach, diligently applied, should protect reasonably against the possible abuse of the right of an employer to resort to surveillance of its employees, in a manner consistent with the obligation which boards of arbitration have to safeguard the integrity of their own procedures, and the credibility of the arbitration process generally.

When the foregoing considerations are applied to the case at hand, what is the result with respect to the issue of the admissibly of the videotape evidence? In the Arbitrator's view it is not difficult to conclude that in this case there were ample grounds for the Company to resort to surveillance of the grievor. As the record discloses, there was in 1991 a previous occasion on which Mr. Chahal was found by the Workers' Compensation Board to have provided false information with respect to his apparent involvement in the operation of a video rental store while claiming benefits. It is not denied that on that basis his claim was rejected. Further, as related above, shortly after the grievor left the work site with his complaint of a back problem the Employer received a report from a medical doctor intimating that in his opinion, based upon certain "false tests" which he gave the grievor during a medical examination, Mr. Chahal was faking his injury. In addition, the Company was in possession of the report of Assistant Supervisor Spalding, to the effect that he had observed the grievor walking in a manner inconsistent with his claim of injury, at a time when Mr. Chahal may have believed he was not being observed. Finally, to all of that must be added the concern which flows naturally from the grievor's unusual pattern of on-the-job injuries which, it appears, far exceeded the average for employees in general. It seems to the Arbitrator that if it were not appropriate for an employer to resort to surveillance of an employee in such a case, it would be difficult to imagine when it would.

Nor do the general facts disclose, to my satisfaction, that there were reasonable alternatives open to the Company. Firstly, as reflected above, the employer did offer modified duties to Mr. Chahal, both at the time of his injury and a month afterwards. Further, regard being had to a number of facts, it would have been naively unrealistic, and indeed counterproductive to determining the truth, for the Company to have communicated its suspicions or concerns to Mr. Chahal, in the circumstances of this case. Foremost among those facts is the record of his prior willingness to deceive the Workers' Compensation Board, in respect of a claim for benefits for a work related injury claim, and at least one medical opinion which suspescted that he was faking. On the whole, the Company had little reason to expect a truthful answer from the grievor.

In the result, I must find, based on the grievor's record, the observation related by his supervisor, the report of Dr. Battersby and Mr. Chahal's previous false statements to the Workers' Compensation Board, that the Company had reasonable and probable grounds to engage in surveillance of his activities during the period of his absence from work, a period in relation to which he was then making an indemnity claim. I am also satisfied that the method by which the grievor was observed, and recorded, and the times and places of surveillance, did not involve an unduly intrusive method or degree of observation. As described below, all of the grievor's actions which were recorded for presentation in evidence were publicly visible. I am satisfied that the surveillance was justified, was conducted in a reasonable manner and that the videotape evidence, the accuracy of which is not challenged, should therefore be admitted.

The video evidence is, by any account, quite remarkable. It represents the activities of Mr. Chahal at his residence on July 26 and 27, 1995. On those two days, over a substantial period of hours, the grievor is seen lifting a heavy rototiller out of his vehicle, tilling the front and back yards of his property, vigourously raking the area, rolling it with a heavy lawn roller and, ultimately, engaging in the carrying and laying of rolls of sod over the whole area, with some assistance from members of his family. During the whole of the time he is seen to be lifting, bending, twisting, working in close quarters under a deck and, on one occasion, deadlifting what is described as a 120 pound rototiller out of the trunk of his car.

By no stretch of the imagination can the activities of Mr. Chahal on the two days in question be reconciled with his statement given to the Company's Claims Department, during the course of an interview several days later, on July 31, 1995. That interview contains, in part, the following statements by Mr. Chahal:

> **All the doctors I have seen to date have advised I am not to perform any type of manual work, no lifting, bending, twisting or walking.** Long periods of sitting and standing start to bother me after about one hour. At the present time, I am unable to sit for more than 20 minutes without having to get up and move around.
>
> ...
>
> Dr. Wadhwa does not know when I can return to work. When I saw him on July 24, 1995, he advised me to stay off work for another 4 weeks. He will wait for the specialist report prior to doing anything further. I see Dr. Wadhwa at least once a week.
>
> **I am unable to perform any type of duties around the house. I cannot even cut my grass.** At present I try to walk more and more each day. Also, I lay flat on the carpet and do some stretching exercises. **For the most part I am confined to the house as I cannot perform any type of manual labour.**
>
> **If the Company provided me with some form of modified duties I would not be able to perform same at this time. I have been unable to perform any type of manual work since my last day worked; June 20, 1995.**
>
> Since my injury on June 20, 1995, I have been unable to bend, twist, walk or stand for long periods without difficulty. **I cannot lift any type of object that has any amount of weight to it. I would not be able to lift a 10 pound spiking hammer without experiencing further pain to my lower back.** I would not be able to operate the crew bus or my own vehicle for more than 20 minutes before experiencing severe pain.
>
> Since June 26, 1995, I have attended my doctor and physiotherapy on a regular basis. **I have not gone anywhere nor have I done any type of work around my house due to my low back condition. After seeing my doctors and physiotherapy, I just stay inside the house and rest my back.**
>
> I commenced physiotherapy at the end of June or beginning of July, 1995. Treatments consist of heat massages and some form of electronic massage. I attend physiotherapy every second day, 3 to 4 times per week. I have no idea how long I will attend physiotherapy. Treatments do not seem to be helping as I still experience severe low back pain. The low back pain has not gone away since June 20, 1995.
>
> [emphasis added]

To put it delicately, a comparison of the videotape evidence with the above representations made by Mr. Chahal to the Company makes it difficult for the Arbitrator to dismiss the suggestion of the Company that there might be some deliberate falsehood in Mr. Chahal's statements.

Nor does it appear that the grievor's sense of the truth was much altered by his subsequent confrontation with the videotaped evidence. When made aware of the evidence in the Company's possession, regarding his activities at his residence on July 26 and 27, Mr. Chahal attempted to revise his earlier statement, recounting, during the course of his disciplinary interview, that he and his family decided that he should try doing some work to see how he would feel, and that he therefore undertook the sod laying, with the benefit of some Tylenol 3 tablets. At that stage he confirmed, however, that he did not have his doctor's authorization to do the yard work. The Company did not

believe that explanation, and discharged Mr. Chahal, based on all of the evidence available to it, on September 25, 1995.

The grievor's version of events changed still further, after his discharge. Notwithstanding his prior explanations, the grievor tendered, through his Union, the following letter from his physician, Dr. P. Wadhwa, of Calgary, Alberta. It reads as follows:

> September 28, 1995
>
> To Whom it May Concern,
>
> Re : Satpal Chahal
>
> Patient was seen on July 25, 1995. He had back pain but he expressed a desire to return to work as soon as possible, and said he would try some duties in and around the home on the 26th, and 27th of July, to see if he can return to work.
>
> Sincerely,
>
> (signed) Dr. P. Wadhwa

As is evident from the above, the explanation given by Dr. Wadhwa is entirely contradictory to the answers given by the grievor during the course of the Company's disciplinary investigation, on August 29, 1995. During that interview the following exchange was recorded:

> Q. Did you at any time after the June 20th reported injury have authorization from the doctor to do yard work?
>
> A. No.

In light of the above, if I must, I am driven to the unfortunate conclusion that the statement of Dr. Wadhwa, dated September 28, 1995, is *ex post facto*, self serving, and wanting in credibility. On the whole of the record, I am satisfied that Mr. Chahal did, as originally suspected by Dr. Battersby, feign the injury to his back or, alternatively, the gravity of that injury, providing false information to the Company to support a claim for a compensable absence from work which was fraudulent and which, ultimately, was not allowed.

In **CROA 2651** the following comments were made:

> In the past this Office has had occasion to consider the seriousness of fraudulent claims of injury, when presented with compelling video tape evidence to sustain the Employer's allegation. (See, e.g., *CROA 2184, 2302*.) In an appropriate case, where the evidence establishes, on the balance of probabilities, that an employee has knowingly engaged in an attempt to defraud the Employer of sick leave, insurance benefits or Workers' Compensation benefits, the seriousness of such action has been sustained by the arbitrator, with discharge generally being found to be appropriate in light of the breach of the relationship of trust fundamental to the employment contract.

In the Arbitrator's view the evidence adduced discloses, beyond any serious discussion, a remorseless pattern of deliberate falsehood and deceit engaged in by the grievor, to falsely claim benefits for an injury which he did not in fact sustain, or which, if he did sustain it, was plainly not such as to prevent him from performing either his regular duties or the modified duties offered by the Company. There is no basis upon which an employer should be expected to maintain a relationship of trust with a person who has conducted himself in the fashion exhibited by the grievor. In the circumstances I am satisfied that the discharge of Mr. Chahal was for just cause, and that there are no mitigating factors which would justify a reduction of that penalty. The grievance is therefore dismissed.

March 15, 1996

(signed) MICHEL G. PICHER
ARBITRATOR