

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2772

Heard in Montreal, Thursday, 12 September 1996

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

Employee J. Sneddon was dismissed from the employ of CanPar, effective April 10, 1996, for the alleged theft of Company funds.

JOINT STATEMENT OF ISSUE:

Mr. Sneddon was dismissed for the alleged theft of Company funds which occurred on or about April 2, 1996. During the subsequent investigation interview, held on or about April 10, 1996, Mr. Sneddon denied committing any theft of funds. When shown a video, allegedly of the theft, he denied being the person in the video.

The Union argues that the area where the alleged theft occurred is unsecured, the case box was unlocked, and anyone had access to the area in question. Furthermore, the original video was not shown at the interview and the copy provided is useless due to its poor quality. The Union requested that Mr. Sneddon be reinstated immediately with full reimbursement for all lost wages and benefits.

The Company has denied the Union's request.

FOR THE UNION:

(SGD.) D. J. DUNSTER
EXECUTIVE VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) P. D. MACLEOD
DIRECTOR OF TERMINALS

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Vice-President, Operations, Toronto
D. Tomlinson	– Terminal Supervisor, Barrie
J. Iafrate	– Manager, Loss Prevention, Toronto

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
R. Nadeau	– Assistant Vice-President, Quebec
P. Dunn	– Shop Steward
J. Sneddon	– Grievor

AWARD OF THE ARBITRATOR

The grievor, Pick-up and Delivery Driver J. Sneddon, was discharged from his employment with the Company for theft of cash from a cash box in the Company's office at the Barrie Terminal. The evidence marshalled against Mr. Sneddon includes a videotape of the theft, taken by way of a hidden camera. It also includes the direct evidence of Terminal Supervisor Doug Tomlinson. The Union takes issue with the admissibility of the videotape evidence, arguing that its use in the case at hand unduly infringes the rights of privacy of the grievor. It also submits that the grievor is not the person who appears on the recorded sequence of videotape, and denies that the Company had just cause for the assessment of any discipline against Mr. Sneddon.

The grievor was hired in August of 1995. The evidence establishes that in the course of the spring of 1996 Mr. Tomlinson was repeatedly short on the cash count for COD deliveries returned by the drivers at the end of the day. The record discloses that in fact the drivers' tallies for the COD's were correct, and the money, in cash or cheques, which they brought back to the terminal was properly accounted for at the initial receiving booth. It became apparent, therefore, that the cash went missing after it had been transferred from the booth to an unlocked cash box which is kept on a desk in the section of the terminal office which is also used as a lunch and paperwork area for the employees. As a result, the Company installed a hidden camera in the ceiling of the area immediately above the desk on which the cash box was kept.

On April 2, 1996, Mr. Tomlinson was the sole person responsible for receiving cash at the end of the day, and placing it in the cash box. The evidence discloses that at 5:47 p.m. Mr. Tomlinson exited the office area and went to the entrance of the terminal for a smoke. At that point in time the only employees remaining on the premises were Mr. Dick Bartlett, Mr. George Mingo and the grievor, Mr. Sneddon. During the period of time when Mr. Tomlinson went outside for a smoke he was accompanied by Mr. Mingo, and they both had a full view of Mr. Bartlett who was then washing a truck. Mr. Sneddon entered the office and, insofar as the evidence discloses, was the only employee in the office until the return of Mr. Tomlinson at 5:58 p.m. Mr. Tomlinson's evidence establishes that when he entered the office Mr. Sneddon was seated at a picnic table immediately adjacent to the desk which contained the cash box.

The videotape tendered in evidence, which is time coded, shows an individual, seen from overhead, wearing a delivery driver's uniform, approach the desk, reach into the cash box and remove \$40.00 in cash. The person then leaves the frame, but not entirely. It can be seen from the picture that the person who removed the cash then sat down at the adjacent picnic table, with one of his feet remaining visible within the picture frame until the return of Mr. Tomlinson, at 5:58 p.m. Mr. Tomlinson confirms that when he reentered the office Mr. Sneddon was seated at the picnic table next to the desk where the cash box was located and that no-one else was present. Shortly thereafter, when Mr. Tomlinson did a count of the cash receipts he found that \$40.00 was missing. He then arranged to obtain the video from the camera, viewed it in the company of Mr. Bartlett, and they concluded that Mr. Sneddon was responsible for the theft.

Counsel for the Union submits, initially, that the videotape evidence should not be admitted. He argues that the Company must first establish that it had sufficient grounds to place employees under surreptitious surveillance, even on its own premises, and that it took all reasonable alternative steps prior to doing so. It refers the Arbitrator to the following cases: **Re Doman Forest Products Ltd., New Westminster Division and International Woodworkers, Local 1-357** (1990), 13 L.A.C. (4th) 275 (Vickers); **Re Air Canada and Canadian Union of Public Employees**, an unreported award of Arbitrator C. Gordon Simmons, dated February 10, 1995; **Re Labatt Ontario Breweries (Toronto Brewery) and Brewery, General & Professional Workers Union, Local 304** (1994), 42 L.A.C. (4th) 151 (Brandt); as well as **CROA 2651** and **CROA 2707**.

In the Arbitrator's view the objection of the Union cannot prevail. In **CROA 2707** the jurisprudence relied upon by the Union, and the principles found within it were thoroughly reviewed by this Office. As that award reflects, a two-part analysis must be gone through in considering whether evidence obtained by the surreptitious surveillance of employees is admissible. Firstly, the Arbitrator must determine whether it was reasonable, in the circumstances, to place employees under surveillance. Secondly, consideration must be given as to whether the surveillance was conducted in a way which is reasonable, not unduly intrusive and which fairly corresponds with the obtaining of the information necessary to the employer's legitimate business interests.

In the Arbitrator's view it would be difficult to conceive of a more justified situation for the use of a surveillance camera, which is in effect a security camera, to record and safeguard the location on an employer's premises where cash is kept and has consistently gone missing. The case at hand does not involve surveillance other than at the workplace, and for the sole purpose of observing whether anyone gained unauthorized access to the open cash box kept on the desk, and removed money from it. The Arbitrator knows of no principle which would prohibit the employer from installing a security camera to safeguard a sensitive area of its own premises. That, effectively, is what happened in the instant case. Nor can I find that the method of surveillance was unreasonable or unduly intrusive. The area surveyed is an open office and lunch space used by a number of employees and supervisors, none of whom could reasonably expect a substantial degree of privacy in that location. No undue violation of anyone's right to privacy is disclosed, and the Arbitrator is, therefore, satisfied that the videotape in question is admissible.

Counsel for the Union next argues that the overhead view of the person removing the cash is not sufficiently clear to confirm, to a compelling standard of evidence, that Mr. Sneddon is the culprit. On that basis he also argues that the Company has not discharged the onus which is upon it, by clear and cogent evidence, to show that the grievor was responsible for the theft, and that there was therefore just cause for his discharge.

Counsel for the Company counters that the evidence in question is overwhelming, and must be viewed as a whole. He stresses that the Company relies not only upon the videotape evidence, which it submits does show Mr. Sneddon taking the money, but the evidence of contemporary events attested to directly by Mr. Tomlinson, who entered the office, as can also be seen from the videotape, immediately after the event, and saw Mr. Sneddon to be the person who was seated at the picnic table, the same person whose foot remained in the frame of the videotape picture. In other words, Counsel submits, the evidence is more than sufficiently complete to confirm the identity of Mr. Sneddon.

The Arbitrator must agree with Counsel for the Company. As noted above, it is beyond dispute that the person who removed the \$40.00 from the cash box on the desk top then sat immediately adjacent, at the picnic table, and did not leave that location until Mr. Tomlinson's return, all of which is registered on the videotape. By Mr. Tomlinson's own evidence, there can be no doubt that Mr. Sneddon was the person seated in that location. Further, as discussed earlier, the only other persons on the premises were outside the building, and Mr. Sneddon was the only person in the office. In the circumstances the Arbitrator must conclude that the Company has presented clear and cogent evidence to establish, on the balance of probabilities, that the grievor was responsible for the theft of \$40.00 from the cash box in the office of the Barrie Terminal on April 2, 1996.

The grievor is a relatively new employee, employed in a position of trust. His act of theft which, it may be inferred, was part of a series of such events, plainly broke the bond of trust between himself and his employer. If there can be any doubt about that, his denial, to the point of arbitration, of his actions leaves little question that there is no basis upon which to consider a mitigated penalty.

For all of these reasons the grievance is dismissed.

September 14, 1996

(signed) MICHEL G. PICHER
ARBITRATOR