CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4658 & 4659

Heard in Calgary, November 13, 2018

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE 4658:

Policy Grievance on behalf of CN Conductors and Trainmen of Western Canada and specifically Conductor Ali Raza Khan, of Edmonton, Alberta, regarding the surreptitious and inappropriate use of forward facing cameras to monitor rule compliance.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On April 8, 2016, CN Communicated by System Notice No. 908 entitled "Roll by Inspection Quality – Importance for Safety" that they would be using forward facing cameras to monitor, in compliance with CRO Rule 110.

The Grievor, Ali Raza Khan, received a CATS Broadcast Message informing him that he had been observed at Evansburg West as part of CN's "Roll By Confirmation" program and was found to be in compliance with CRO Rule 110.

It is the Union's position that the surreptitious observation of employees for the purpose of Rules compliance as indicated in System Notice No. 908 violates individual employees' right to privacy. It is not a reasonable utilization or the stated intended use of the forward-facing cameras on CN locomotives. It is well established jurisprudence that the use of video surveillance for the sole purpose of observing employees to evaluate them for the purposes of possible discipline is an abuse of member's right to privacy.

The Union requests the Company cease and desist utilizing forward facing cameras to monitor employees for Rule violations immediately. The Union further requests that any discipline assessed based upon the information gleaned by the inappropriate and illegal use of those cameras be declared void *ab initio.*

The Union further requests an appropriate remedy for the blatant and indefensible violation of Article 152 of the 4.3 Agreement, as outlined in Article 121.10 of the 4.3 Agreement.

DISPUTE 4659:

Policy Grievance on behalf of CN Conductors and Trainmen of Western Canada regarding CN's surreptitious and inappropriate use of their Video camera network to monitor employees for job performance and rule compliance.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On June 21, 2016, CN communicated by System Notice No.914 that they would be using its video camera network, including yard cameras and forward-facing camera mounted on locomotives for the purpose of "Performance Monitoring and Rules Compliance".

It is the Union's position that the surreptitious observation of employees for the purpose of performance monitoring and rules compliance as indicated by System Notice No.914 violates individual employees' right to privacy. It is not a reasonable utilization or the stated intended use of the forward-facing cameras on CN locomotives. It is well established jurisprudence that the use of video surveillance for the sole purpose of observing employees to evaluate them for the purposes of possible discipline is an abuse of member's right to privacy.

The Union requests the Company cease and desist utilizing their cameras network to monitor employees for job performance and rule violations immediately. The Union further requests that any discipline assessed based upon the information gleaned by the inappropriate and illegal use of those cameras be declared void ab initio.

The Union further requests an appropriate remedy for the blatant and indefensible violation of Article 152 of 4.3 Agreement, as outlined in Article 121.10 of the 4.3 Agreement.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R.S. Donegan	**(SGD.)**
General Chairperson	

There appeared on behalf of the Company:

K. Morris	– Senior Manager, Labour Relations, Edmonton
D. Houle	– Labour Relations Associate, Edmonton

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
R. Donegan	– General Chairperson, Saskatoon
J. Thorbjornsen	– Vice General Chairperson, Saskatoon
C. Bradford	– Vice General Chairperson, Saskatoon

AWARD OF THE ARBITRATOR FOR THE PRELIMINARY OBJECTION

The Union filed two grievances (**CROA 4658** & **CROA 4659**) both alleging that the Company had breached the provisions of the Collective Agreement by implementing a policy relative to forward-facing cameras.

While there were some minor disputes, it nevertheless appears that the grievances followed their "*normal*" course relative to the amount of time required to process them.

CROA 4658

On June 23, 2016, the Union initiated a grievance - at the last step of the appeal process (Step 3) - on behalf of Ali Raza Khan, an Edmonton conductor, alleging that the Company violated a provision in the Collective Agreement related to employee privacy in the workplace and requested a meeting to discuss the matter. On July 7, 2016, the Company requested a meeting with the Union to discuss the grievance. Neither meeting took place. Approximately six months later, in February 2017, the Union submitted a Joint Statement to the Company. On September 7, 2017, the Union advised the Company of its intent to proceed to arbitration on an *ex-parte* basis and thereafter filed its *Ex-parte* Statement with the General Secretary of CROA on September 8, 2017.

The Company filed a preliminary objection with the General Secretary prior to the matter being docketed for hearing. In it, the Company submits that the Union failed to progress the allegations through all the mandatory steps of the grievance procedure and therefore the grievance was inarbitrable.

CROA 4659

On August 16, 2016 the Union initiated a separate grievance - at the last step of the appeal process (Step 3) - on behalf of conductors in Western Canada alleging that the Company violated the Collective Agreement 4.3 relative to the use of forward-facing cameras.

On October 14, the Company requested a meeting. That meeting did not take place. In February 2017, the Union submitted a Joint Statement. On September 6, it

advised the Company of its intention to proceed to arbitration on an *ex-parte* basis and filed its *Ex-parte* Statement with the General Secretary of CROA on September 8, 2017.

Prior to the matter being docketed, the Company filed a preliminary objection with the General Secretary on the basis that the Union had failed to progress the allegations through all the mandatory steps of the grievance procedure and the alleged grievance was therefore inarbitrable.

The General Secretary thereafter advised both parties that the preliminary objections would be scheduled for arbitration.

Relevant provisions

The relevant provisions of the Collective Agreement (4.3) and the *CROA Memorandum of Agreement* provide as follows:

> ***121.1*** *A grievance concerning the interpretation or alleged violation of this agreement … shall be processed in the following manner:*
>
> *An appeal against discharge, suspension, restrictions, including medical restrictions, demerit marks in excess of 30, or demerit marks which result in discharge for accumulation of demerits, shall be initiated at Step 3 of this grievance procedure. All other appeals against discipline imposed shall be initiated at Step 2 of this grievance procedure.*
>
> ***(a) Step 1 - Presentation of Grievance to Immediate Supervisor***
>
> *Within 60 calendar days from the date of cause of grievance the employee or the Local Chairperson may present the grievance in writing to the immediate supervisor, who will give a decision in writing within 60 calendar days of receipt of grievance. Time claims which have been declined or altered by an immediate supervisor or delegate, will be considered as being handled at Step 1.*
>
> ***Step 2 - Appeal to District Superintendent (Transportation)***
>
> *Within 60 calendar days of the date of the decision under Step 1, or in the case of an appeal against discipline imposed within 30 calendar days*

of the date on which the employee was notified of the discipline assessed, the Local Chairperson or the General Chairperson may appeal the decision in writing to the District Superintendent (Transportation).

The appeal shall include a written statement of grievance as it concerns the interpretation or alleged violation of the agreement, and identify the specific provisions involved. The written statement in the case of an appeal against discipline imposed shall outline the Union's contention as to why the discipline should be reduced or removed.

The decision will be rendered in writing within 60 calendar days of receipt of the appeal.

Step 3 - Appeal to Vice-President

Within 60 calendar days of the date of decision under Step 2 the General Chairperson may appeal the decision in writing to the regional Vice-President.

The appeal shall be accompanied by the Union's contention, and all relevant information concerning the grievance and shall be examined in a meeting between the Vice-President, or delegate, and the General Chairperson. The Vice-President shall render his decision in writing within 30 calendar days of the date on which the meeting took place. Should the Vice-President consider that a meeting on a particular grievance is not required, he or she will so advise the General Chairperson and render the decision in writing within 60 calendar days of the date of the appeal.

Final Settlement of Disputes

121.2 *A grievance which is not settled at the Vice-President's Step of the grievance procedure may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work.*

121.3 *A request for arbitration shall be made within 60 calendar days from the date decision is rendered in writing by the Vice-President by filing written notice thereof with the Canadian Railway Office of Arbitration and on the same date a copy of such filed notice will be transmitted to the other party to the grievance.*

Workplace Environment

152.1 *Management agrees it must exercise its rights reasonably. Management maintains it ensures a harassment free workplace 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.*

CROA&DR

6. *The jurisdiction of the arbitrators shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;*

(A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and

(B) other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration & Disputes Resolution for final and binding settlement by arbitration; but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this agreement.

9. *No dispute of the nature set forth in section (A) of clause 6 may be referred to arbitration until it has first been processed through the last Step of the grievance procedure provided for in the applicable collective agreement. Failing final disposition under the said procedure a request for arbitration may be made but only in the manner and within the period provided for that purpose in the applicable collective agreement in effect from time to time or, if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in section (A) of clause 6, within the period of 60 days from the date decision was rendered in the last Step of the grievance procedure.*

No dispute of the nature set forth in section (B) of clause 6 may be referred to the Office of Arbitration until it has first been processed through such prior Steps as are specified in the applicable collective agreement.

Company

The Company argues that the Union, by filing both grievances in the first instance through the General Chairman at Step 3, failed to progress the grievances through the mandatory steps of the grievance procedure as set out in Article 121.1. It asserts that accordingly, based on the provision of *Rule 6 of CROA*, the grievances are inarbitrable

and I lack jurisdiction to hear them. In that regard, it relies on the provisions of Articles 121.1, 121.2, 121.3 of the *Collective Agreement* as well as Rules 6, 9, and 14 of the *CROA Memorandum of Agreement* as amended May 20, 2004.

According to the Company, the language of the Collective Agreement - relative to the grievance process - is both specific and mandatory. It asserts that the two grievances at issue here are not related to any of the specific exceptions noted in Article 121.1 of Agreement 4.3, and submits that my jurisdiction to rule upon the merits of a dispute progressed to CROA are conditional upon the parties' mandatory obligation to process a grievance through all the proper steps of the grievance procedure. It argues that the Union's failure to do so in the cases before me is fatal to the arbitrability of both grievances.

The Union

Both grievances were filed by the General Chairperson (at Step 3) and allege, *inter alia*, that the Company violated its obligation to exercise its rights in a reasonable manner and in accordance with the terms the Collective Agreement.

In addition to arguing estoppel and/or failure of the Company to respond in a timely fashion, the Union bases its principal argument on Article 152 of the Collective Agreement

which it submits overrides any objection in the circumstances because it expressly permits a General Chairperson to advance a grievance at his/her level (Step 3).

Decision

I will deal initially with the Union's position that the Company is barred from raising its objections having regard to the principles of delay, waiver, estoppel and bad faith. With respect, I am of the view that the evidence does not establish that the "*delay*", as categorized by the Union, was inordinate or represented a marked departure from what the parties in this process appear to have accepted as some level of normal. Furthermore, the evidence is insufficient to establish either estoppel or bad faith. In **CROA 4106** (pp. 10 -11) Arbitrator Picher reached a similar conclusion in circumstances similar to those before me.

The remaining issue is whether or not, in the circumstances, the provisions of Article 152 serve to provide the Union access to the grievance procedure - at Step 3 - without following the necessary Steps set out in Article 121.1. As stated by the Union in its Brief (para. 58):

> *The Company submits that the Union's grievance is fatally flawed and inarbitrable because the Union did not initiate it at Step 1 and follow every procedure and time limit under the collective agreement as if either grievance was required to be initiated at Step 1. The question therefore is whether the Union is required in these circumstances to initiate the grievances by the General Chairperson at Step 1 and follow all those Steps and time limits instead of filling such a grievance at Step 3 through the General Chairperson's office in accordance with Article 152.*

There is no dispute that the grievances were filed in the first instance through the General Chairman at Step 3.

The Union submits that:

> *"... Article 152 overrides any objection in the circumstances since it expressly permits the General Chairperson to advance such a grievance at his or her level (Step 3)".*

It argues that since Article 152 specifically authorizes the General Chairperson to file a grievance at first instance, it underscores the fact that the General Chairperson has the authority to similarly file a grievance at any stage of the procedure. Absent the ability of the General Chairperson to do so would result in the grievance process being disrupted and delayed. In **CROA 4106** (p. 7), the Union made a similar argument:

> *The position of the Union is that the parties intended, from the inception of Addendum 95, that a General Chairperson could raise a "remedy" grievance of his or her own initiative, and bring it directly to the appropriate Company officer for resolution. In the Union's view while such Union claims may be drawn from grievances which have been progressed through the various Steps of the grievance procedure, they need not have so progressed, and can in fact be initiated by the General Chairperson. In the Union's view that does not in fact constitute the submission of the grievance at Step 3 of the grievance procedure, but is nevertheless entirely in keeping with the intention of Addendum 95.*

Here, Article 152 specifically addresses harassment free work place environment issues. It expressly directs that:

> *"… 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…".*

And, it allows for the immediate submission of a grievance to the General Chairperson which, thereby, provides a more expeditious turn-around time for the processing of the same. However, a reading of Article 152 makes it apparent that it is narrow in its scope and application *("… An employee alleging harassment and intimidation by management …")* and is not intended to apply in the circumstances before me. In fact, in its *ex parte* Statement of Issue the Union raises a breach of privacy rights as a basis for the grievance. There is nothing in the language of Article 152 which would lend itself to a conclusion that it paves the way for Step 3 grievances - in the circumstances of these two cases - to be filed by the General Chairperson without complying with the appropriate provisions of Article 121.1. To conclude otherwise would, in my view, require clear and specific language which overrides the provisions of Article 121.1.

In **CROA 4106**, Arbitrator Picher reached a similar conclusion:

> *Having considered the submissions of the parties, I turn to resolve this dispute. Firstly, what is the intention of Addendum 95? With the greatest respect to the submission advanced on behalf of the Union, I can see nothing in the language of Addendum 95 which indicates that it is intended to operate entirely independently of the normal grievance provisions found in article 73 of the collective agreement, save for one exception. As is evident from the language of Addendum 95, remedy grievances which are unresolved can be referred to arbitration within thirty days, rather than the sixty calendar days provided for under article 73.3 of the collective agreement. From a purposive standpoint, I am also persuaded by the submission of the Company that it is more plausible that the parties would have intended that all grievances, including remedy grievances, should have the benefit of being discussed and reviewed at the Steps of the grievance procedure. In Canadian collective bargaining the grievance procedure is well recognized to be intended to assist in identifying issues and, if possible, resolving them through whole or partial settlements or, in the event they are found to be without merit, their possible withdrawal by the Union. In my view the parties should be presumed to have wanted to preserve that exercise for all grievances, including remedy grievances under*

> *Addendum 95, as least to the extent that they have provided no clear and unequivocal language to the contrary. Therefore, from the standpoint of the interpretation of the collective agreement, I would be compelled to conclude that the Company's interpretation is correct.*

The language of the Collective Agreement relative to the grievance procedure is both specific and mandatory. Although there are provisions in Article 121.1 which direct that specific appeals against discharge, suspensions etc. shall be initiated at Step 3, all other appeals – by definition - must be processed through the Step 1 and 2 procedures. The parties' intention in that respect is underscored by the initial paragraph of Step 3 which directs that:

> *Within 60 calendar days of the date of decision under Step 2 the General Chairperson may appeal the decision in writing to the regional Vice-President.*

It is apparent that, except in the circumstances envisioned by Article 152.1 (workplace harassment), appeals by the General Chairperson must be exercised having regard to the provisions of Article 121.1 (i.e. Steps 1 and 2).

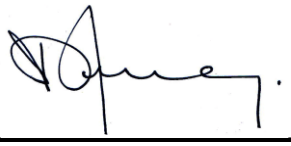
In his award in case **CROA 4106**, Arbitrator Picher concludes:

> *In the result, the Arbitrator is compelled to conclude that the Company's interpretation is correct. There is very simply no language within Addendum 95 which would suggest that a remedy grievance is exempt from the procedural requirements of article 73 of the collective agreement, save for the shorter period identified for referral to arbitration. In effect, Addendum 95 allows a General Chairperson to expand the scope of a grievance at Step III and carry the matter forward from that point as a remedy grievance. Doing so then triggers a faster track to arbitration in 30 days rather than 60 CROA&DR 4106 days. However, there is no language in Addendum 95 to suggest that the normal Steps of the grievance procedure can be ignored.*

I agree. For all the reasons above, I conclude that Article 152 does not serve to override the Union's obligation to comply with a strict and clear provisions of Article 121.1.

My jurisdiction has been clearly circumscribed by the parties in Sections 6 and 9 CROA&DR. Given that the Union has failed to comply with the requirements of Article 121.1 and that my jurisdiction is *"…conditioned upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this agreement",* I lack jurisdiction to hear these matters.

The Preliminary Objections are allowed.



February 20, 2019

RICHARD I. HORNUNG, Q. C.
ARBITRATOR