

IN THE MATTER OF THE ARBITRATION OF THE FEBRUARY 19, 2009 GRIEVANCE OF  
ROB BIRCH PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT

BETWEEN:

THE SASKATCHEWAN JOINT BOARD, RETAIL,  
WHOLESALE AND DEPARTMENT STORE UNION

(hereinafter referred to as the "Union")

AND:

McKESSON CANADA CORPORATION

(hereinafter referred to as the "Employer")

BEFORE:

William F.J. Hood, Q.C., Arbitrator

APPEARING FOR THE EMPLOYER:

Eileen Libby, Q.C.

APPEARING FOR THE UNION:

Larry Kowalchuk

HEARING DATES:

November 26, 2009, Regina, Saskatchewan

(Adjourned to January 27, 2010)

**INTERIM AWARD**

**I. BACKGROUND:**

1. Robert Birch ("Birch"), a 27-year employee of the Employer, claims that his suspension for roughly 1 1/2 days without pay was unjust. The suspension resulted from a physical altercation between Birch and another employee in the Employer's warehouse. The other employee was also disciplined.

2. In issue are the particulars of this altercation. Immediately after the altercation, Birch reported to his Supervisor, Neil Catchuk ("Catchuk"), that he and the other employee had a fight, and that the other employee had hit him. When asked if there were any witnesses Birch informed Catchuk that the incident was captured on the cameras in the warehouse. Catchuk and Birch then viewed the videotape of the incident.

3. In the course of the hearing, the Employer seeks to introduce into evidence this videotape. The Union objects. The Union submits that there was an agreement with the Employer when the cameras were initially installed, that they would not be used to monitor

employee performance and not be used in disciplinary proceedings, such as the present grievance. The Union furthermore submits that the video surveillance in these circumstances violates the reasonable expectation of privacy of the employees, including Birch.

4. A *voir dire* was held during the hearing regarding the issues raised in connection with the admissibility of the video evidence.

5. Rob Salmond ("Salmond"), a Senior Warehouse Clerk, Shop Steward and 15-year employee of the Employer, testified that he was involved when the cameras were initially installed in the warehouse, in and around December of 2005. Salmond testified that Ray Smith ("Smith"), the Manager at the time, said the cameras were installed for security purposes only. Salmond drew from these discussions that there was an agreement that the video would not be used in any disciplinary proceedings.

5. Brian Haughey ("Haughey"), a Staff Representative for the Union, also testified. Haughey sent the following letter on October 27, 2005 to Smith:

Re: Surveillance Cameras

I have been advised that McKesson Regina is intending to install surveillance cameras in its distribution centre. We are opposed to the installation of any cameras and will take legal action to have them removed if necessary.

Various tribunals have found that video surveillance interferes with an employee's right of privacy. Only under extreme situations is an employer entitled to supersede this significant fundamental right.

I'm certainly not aware of any significant issues that would cause the Company to need to resort to this extreme measure.

Please confirm that the planned installation of the cameras will not occur.

6. Haughey testified that Smith told him the cameras were installed for security reasons only and not to discipline employees. Smith, who retired as Manager of the Distribution Centre of the Employer two years ago, also testified. In response to Haughey's concerns and letter, Smith provided a letter to Haughey on December 1, 2005 which states as follows:

RE: Closed Circuit Television System

As a follow up to our telephone conversation with regards to McKesson Canada installing a closed circuit television system in our Regina Distribution Centre, I would like to further explain the reason for the installation of the cameras and their use.

These cameras are in fixed locations, specifically covering the employee entrances, shipping and receiving doors and compound, employee parking lot and controlled drug packing table. The purpose of this is to further enhance the security and protection of our property as well as our most important asset, our employees. There will be no compromise to the employee "expectation of privacy" in reference to their lunch room, locker room, washrooms or daily work areas in the warehouse.

The camera located above the controlled drug packing table will enable us to monitor each item as it is packed for each customer shipping carton. This will help us to determine which box an item may have been inadvertently packed when a customer claims a shortage. This camera is in a fixed position over the packing table and does not record the rest of the room that this employee works in.

Signs will be posted informing the employees of the installation of the cameras.

I hope this clears up any misconceptions of the reason for the installation of the cameras and their use. If you have any further questions or concerns, please do not hesitate to contact me.

7. Smith understood the Union's concern was that the cameras would be used to monitor employees and to discipline them if found not to be productive, or to be used in performance reviews of such employees. Smith agreed that such use of the cameras was not to occur. However, Smith denied saying to Haughey, or anyone else in the Union, that the video from the camera would never be used in disciplinary proceedings.

8. The cameras were installed in the locations set out in the December 1, 2005 letter. The Union, including Birch, were aware of the presence of the cameras.

9. If it can be established that the video evidence is reliable and relevant, it is my conclusion that the video evidence from such cameras is admissible in these proceedings as evidence of what happened in the altercation. The video evidence is reliable if it is proven to be accurate and authentic. The weight to be accorded to such video evidence, when and if admitted, will be determined against the other evidence presented concerning this incident.

10. The agreement that existed between the Employer and the Union was that the cameras would not be used to monitor performance, with the view to discipline for inadequate performance or influence performance reviews. The use in the present case does not offend this agreement. The December 1, 2005 letter states: “[t]he purpose of this is to further enhance the security and protection of our property as well as our most important asset, our employees.” In this case, Birch first sought to vindicate himself by inviting his Supervisor to view the camera recording of the incident. This is consistent with the purpose of the cameras.

11. The Employer did not agree that video evidence from these cameras would not be used in disciplinary proceedings like the present case.

12. Also, there is nothing surreptitious about the video surveillance. The “reasonable test” invoked by many arbitrators, before admitting video surveillance of an employee in grievance proceedings, is founded for the most part in circumstances where the taking of such video is covert and unknown to the employee(s). This is not the present case. Both the Union and the employees, and in particular Birch, were aware of the presence of the cameras and what would be captured and recorded.

13. I am also satisfied that the video surveillance in the present circumstances does not violate either the reasonable expectation of privacy to Birch or such rights afforded under statutory legislation such as *The Privacy Act*, R.S.S. 1978, c. P-24 or *The Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 insofar as it is applicable in Saskatchewan.

14. In my view, the cameras were installed in the warehouse of the Employer for legitimate business purposes with no intent to compromise the reasonable expectations of employees’ privacy. The presence of the cameras and the video that would be captured was known to the Union and Birch. The purpose as stated in the December 1, 2005 letter was the exercise of a lawful right of security and protection of the Employer’s property and its employees.

15. I am also cognizant of s. 25(2)(c) of *The Trade Union Act*, R.S.S. 1987, c. T-17 which provides greater latitude to an arbitrator to accept into evidence that which may not otherwise be admissible in a court of law. Although s. 25(2)(c) refers to “oral or written evidence”, which may

not include video evidence, in my view, in this case that matters not. Video evidence that is reliable and relevant is good evidence. Sopinka, Lederman & Bryant: *The Law of Evidence in Canada* (Third Edition) (LexisNexis Canada Inc. 2009) states as follows at p 46:

2.21 In *R. v. Nikolovski*, [[1996] 3 S.C.R. 1197] the Supreme Court of Canada held that a videotape alone, without any corroborating evidence, can provide the necessary evidence to enable the trier of fact to identify the accused as the perpetrator of the crime. In many ways, it is a better eyewitness to events than a human being. It does not suffer from potential frailties of human observation, recollection and communication. As Cory J. put it:

The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.

2.22 Thus, the videotape itself constitutes original evidence from which the trier of fact can draw his or her own inferences.

16. Video evidence, even if improperly obtained, is admissible. As a general rule, subject to circumstances where the *Canadian Charter of Rights and Freedom* apply, the test for admissibility of evidence in a court of law is relevance and if admissible, the court is not concerned with how the evidence was obtained (see *R. v. Wray*, [1971] S.C.R. 272).

DATED this 26<sup>th</sup> day of January, 2010.



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William F.J. Hood, Q.C., Arbitrator